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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KALAN INC. AND
HOSPITAL CORPORATION OF AMERICA,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Importers of merchandise must pay estimated duties at the time of entry at the rate and in the amount determined by the United States Customs Service, but may not challenge any aspect of such determination until after the final ascertainment of duties ("liquidation"), which occurs months and sometimes years later. In 1984, Congress enacted section 520(d) of the Tariff Act to provide that when an importer's administrative protest or court challenge against the liquidation is approved, interest shall be allowed on the refund of the amount paid as increased or additional duties from the date of payment to the date of refund of the duties.

The Customs Service has interpreted this provision to require the payment of interest only when the refunded overcharged duties first were collected as a result of a liquidation that changes the initial determination. Thus, when a liquidation does not change the initial determination (as is the case for the vast bulk of the hundreds of billions of dollars of imports entered annually), Customs asserts that it need not pay any interest on refunds that subsequently are made pursuant to the importer's successful administrative or judicial challenge to liquidation.

The question presented is whether, under section 520(d), an importer who is successful in its administrative protest or court challenge is entitled to interest on refunded overcharged duties when the overcharge initially occurs at the time of entry and is affirmed months or years later in liquidation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
Introduction	3
Proceedings in the Court of International Trade: *Kalan Inc. v. United States*	4
Proceedings in the Court of International Trade: *Hospital Corporation of America v. United States*	5
Proceedings in the Court of Appeals for the Federal Circuit: *Kalan Inc. v. United States*	8
Proceedings in the Court of Appeals for the Federal Circuit: *Hospital Corporation of America v. United States*	9
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	13a
APPENDIX D	21a
APPENDIX E	30a
APPENDIX F	34a

TABLE OF AUTHORITIES

CASES:	Page
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)	10
Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932)	12
District of Columbia v. Carter, 409 U.S. 418 (1983)	12
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982)	10
Sheridan v. United States, 487 U.S. 392 (1988)	10
STATUTES:	
Tariff Act of 1930, as amended:	
Section 505 [19 U.S.C. 1505]	3,6,11
Section 505(b) [19 U.S.C. 1505(b)]	12
Section 505(c) [19 U.S.C. 1505(c)]	2,5,11
Section 520 [19 U.S.C. 1520]	3,11
Section 520(d) [19 U.S.C. 1520(d)]	2,5-7,9-13
28 U.S.C. 1254(1)	2
28 U.S.C. 2632	11
28 U.S.C. 2644	11
MISCELLANEOUS:	
Council of Economic Advisers, *Economic Indicators, October 1991*, 102d Cong., 1st Sess. (Joint Economic Committee Print 1991)	9
Economic Report of the President (Feb. 1991)	10
H.R. Rep. No. 1015, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News	6,7,11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, Kalan Inc. ("Kalan") and Hospital Corporation of America ("HCA"), respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit entered on September 11, 1991 and September 20, 1991, in two different cases involving identical or closely related issues.[1]

OPINIONS BELOW

The opinion of the court of appeals in Kalan Inc. v. United States (App., *infra*, 1a-10a) is reported at

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[1] Petitioners are not related to each other and neither petitioner has any parent companies or subsidiaries (other than wholly owned subsidiaries).

944 F.2d 847. The opinion of the court of appeals in Hospital Corporation of America v. United States (App., *infra*, 11a-12a) is not reported. The opinions of the Court of International Trade (App., *infra*, 13a-20a, and App., *infra*, 21a-29a) are reported at 752 F. Supp. 455 and 752 F. Supp. 459.

JURISDICTION

The judgments of the court of appeals were entered on September 11 and 20, 1991, and this petition was filed within ninety days of that earlier date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 520(d) of the Tariff Act of 1930, as amended (as codified in 19 U.S.C. 1520(d)), provides:

> If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title, or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

Section 505(c) of the Tariff Act of 1930, as amended (as codified in 19 U.S.C. 1505(c)), provides:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

Sections 505 and 520 of the Tariff Act of 1930, as amended (as codified in 19 U.S.C. 1505 and 1520, respectively), in their entirety, are set forth in the appendix (App., *infra*, 30a-33a).

STATEMENT OF THE CASE

Introduction

Importers of merchandise must pay estimated duties at the time of entry at the rate and in the amount deemed appropriate by the United States Customs Service. Months or even years later, each entry of imported merchandise is subjected to a final ascertainment of duties, called "liquidation". The overwhelming majority of import entries—probably as high as 97 percent—is liquidated "as entered", that is, without change. In instances when liquidation results in a reduction in duty, Customs issues a refund check; when liquidation results in a duty increase, Customs issues a bill for the increase. Importers are prohibited by law from challenging any aspect of the collection of duties until after liquidation. Thus, whether the liquidation reflects no change in duty, a duty decrease, or a duty increase, the importer may seek

reliquidation—and a reduction in liquidated duties—by filing a protest after liquidation.

This case concerns the way in which the United States Customs Service, following the allowance of importers' protests, settles accounts with importers who have been overcharged by it. If the overcharge is first collected at the time of liquidation, then the Customs Service takes the view that it must pay interest from the date of payment of the overcharged duties. If, on the other hand, the overcharge occurred at the outset—i.e., the estimated duties initially demanded and paid at the time of importation proved to be excessive—Customs takes the position that no interest at all should be paid.

This counterintuitive view of the law was rejected by judges of the Court of International Trade in two separate actions but in each instance the court's judgment was reversed by the court of appeals.

Proceedings in the Court of International Trade: Kalan Inc. v. United States

Petitioner Kalan imported certain key tags from Korea and was required to enter them as jewelry and pay 11 percent estimated duty. The entries were liquidated without change and Kalan protested, claiming that the merchandise was classifiable as articles not specially provided for, of rubber or plastics, and was duty-free under the Generalized System of Preferences. The protest was denied and Kalan initiated an action in the Court of International Trade. Thereafter, in view of a court decision favorable to Kalan in a related case brought by it, Customs reliquidated the entries in accordance with Kalan's claim. Although Customs refunded all overcharged duties, it did not

pay any interest on the refunded duties. Kalan argued before the court that it was entitled to interest from the date of payment of the overcharged duties—i.e., from the date of payment of the estimated duties. App., *infra*, 14a.

Chief Judge Re declined to find that Customs owed interest on its refunds from the date of payment of the estimated duties, but concluded that Customs owed interest from the date of liquidation, since (citing 19 U.S.C. 1520(d) and 1505(c)) that is when the estimated duties became duties due upon liquidation. App., *infra*, 20a.

Proceedings in the Court of International Trade: Hospital Corporation of America v. United States

Petitioner HCA was required to enter its imported lithotripter under the provision for electro-surgical apparatus and to pay estimated duty at 9.2 percent.[2] The entry was liquidated under the same provision and HCA filed a protest, claiming that the merchandise was properly classifiable as electro-medical therapeutic apparatus, which carried a 4.2 percent rate of duty.[3] The protest was denied and HCA initiated an action in the Court of International Trade. While the action was pending, Customs reversed its position on the classification of the merchandise, allowed the

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[2] A lithotripter is a device that creates shock waves, which are used to disintegrate kidney stones within a patient's body without surgical intervention.

[3] Actually, the merchandise was liquidated with a refund because the estimated duty was improperly based on the 1986 rate of 9.2 percent *ad valorem* rather than on the lower 1987 rate of 7.9 percent *ad valorem*. No interest was paid on this refund and this has never been in issue. App., *infra*, 23a n.2.

protest that was before the court, and refunded the overcharged duties but without any interest. HCA sought a judgment which would allow interest from the date the entry was liquidated. App., *infra*, 22a-24a.

The court agreed with HCA's claim, noting the following:

1. In 1984, Congress amended section 505 of the Tariff Act (19 U.S.C. 1505), by adding subsection (c), which provides that if payment of liquidated duties owed by the importer is not received within thirty days after the date of liquidation, interest is due from the fifteenth day after the date of liquidation. App., *infra*, 25a.

2. In fashioning this legislation, Congress acknowledged that if the government is permitted to collect such interest, importers too ought to be allowed to collect interest on overpayments if they are successful in protesting the classification of their merchandise. App., *infra*, 25a (citing H.R. Rep. No. 1015, 98th Cong., 2d Sess. 68, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5027).[4]

3. "This 'reciprocity of payment of interest' was accomplished 'by adding a new paragraph [section 520(d) of the Tariff Act (19 U.S.C. 1520(d))] which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as a result of a protest. . . . Interest would be paid on the amount of the overcharge at a rate to be determined by the Secretary of the Treasury'."

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[4] The relevant section of H.R. 1015 (pages 66-69) is reproduced in the Appendix. App., *infra*, 34a-37a.

App., *infra*, 25a (citing and quoting from H.R. Rep. No. 1015, 98th Cong., 2d Sess. 67, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5026).

4. The Customs Service's contention that the refund received by the importer was merely a refund of "estimated duties" and not a refund of "increased or additional duties" upon which interest must be paid under section 520(d) reflected too narrow a construction of section 520(d) to be consistent with the legislative intent. "Estimated duties do not exist in a vacuum. They are the amount which Customs believes will be the duties the importer will owe upon liquidation. Once merchandise is liquidated and Customs determines the duty owed 'upon liquidation' the estimated duties cease to be estimates. Whatever portion of those duties is retained by Customs constitutes the duty paid upon liquidation. Though [HCA] did not itself send payment to Customs at liquidation, the estimated duties on deposit with Customs were used to pay what [HCA] was found to owe upon liquidation. Hence, when Customs retained more of HCA's deposit of estimated duties than it should have, HCA paid excess duties upon liquidation." App., *infra*, 27a (footnote omitted).

5. "Since the government had use of that money to which it had no rightful claim, 19 U.S.C. 1520(d) allows the importer to collect interest on the refund. [HCA] should not be denied interest because it deposited estimated duties prior to liquidation, rather than wait until after liquidation to pay." App., *infra*, 27a.

Proceedings in the Court of Appeals for the Federal Circuit: Kalan Inc. v. United States

Relying on the rule that waivers of sovereign immunity are construed strictly in favor of the sovereign, the court of appeals found no obligation on the part of the Customs Service to pay interest on liquidated overcharges initially collected as an estimated duty deposit at the time of entry rather than on those overcharges collected after liquidation. The court found that "increased or additional duties" were distinct from, and did not embrace, estimated duties paid prior to liquidation (even though after the filing of a protest against the liquidation, the duties were determined to be overcharges). The court based much of its reasoning on the appearance of the words "increased or additional duties" in other statutory provisions and in the relevant legislative history and on the use of those words to signify additional duties due to Customs as a result of liquidation or reliquidation. App., *infra*, 4a-10a.

Proceedings in the Court of Appeals for the Federal Circuit: Hospital Corporation of America v. United States

The court of appeals adopted the reasoning of its *Kalan* decision. It found the "increased or additional duties" language of section 520(d) to be a term of art and to restrict the accumulation of interest only to those overcharged duties first charged at liquidation. The court took "note of the argument that the usage of the word 'overcharge' in the legislative history supports a different interpretation" but concluded that "in view of the meaning in Customs law of the terms 'excess', 'increased', and 'additional' duties, that [restrictive] meaning must apply." App., *infra*, 11a-12a.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted because if the decisions below are left undisturbed, a mischievous rule of law never intended by Congress will work both absurd and unfair results on a large scale, undermining public confidence in an adjudicatory process carried out under the auspices of the Executive and Judicial Branches and unjustly depriving importers of millions of dollars of interest on overcharged duties per year. This case affects the entire importing community of the United States in its day-to-day dealings with the Customs Service.[5]

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[5] That community and the magnitude of commercial activity in which it engages are substantial: in 1990, imports into the United States reached a level of $704.0 billion, or 12.88 percent of the gross national product. *See* Council of Economic Advisers, *Economic Indicators, October 1991*, 102d Cong., 1st Sess. 1 (Joint Economic Committee Print 1991). Twenty-five years earlier, im-

1. The results which flow from the decisions of the court of appeals are irrefutably illogical and absurd. If, upon allowance of a protest, the Customs Service refunds money to an importer, which money was demanded and paid as additional duties following liquidation, Customs will award interest from the date of payment. If, upon allowance of a protest, Customs refunds money to an importer, which money had been demanded and paid earlier as estimated duties, then Customs will award no interest at all, notwithstanding that in the latter situation, Customs will have held the importer's overcharged money for a longer period of time.

In interpreting the relevant statute to produce such a result, the court of appeals was in conflict with an established line of cases of this Court counseling against such an interpretation. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Sheridan v. United States*, 487 U.S. 392, 402-03 n.7 (1988) ("[C]ourts should strive to avoid attributing designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading.").

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ports were at only $33.2 billion (1965 dollars) and accounted for only 4.71 percent of GNP. *See Economic Report of the President* (Feb. 1991) at 286-87.

2. Indeed, Congress manifestly did not intend such a result. The very legislative history discussed by the courts below demonstrates as much. *See* H.R. Rep. No. 1015, *supra*, at 66-68 (App., *infra*, 34a-37a). Congress wished to overturn a decision of the Court of Customs and Patent Appeals which enabled importers to postpone payment of duties determined to be due on liquidation or reliquidation, for an extended period of time, without having to pay interest. While Congress added subsection (c) to section 505 of the Tariff Act in order to provide for interest on duties due the Customs Service following liquidation or reliquidation, it also added subsection (d) to section 520 in recognition of "the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum." *Id.* at 68 (App., *infra*, 37a). Thus, under section 520(d), such an importer would receive interest "on the amount of the overcharge . . . calculated from the date of payment to the date of refund or the filing of a summons under 2632 of title 28, United States Code, whichever occurs first." *Id.* at 67 (App., *infra*, 34a).[6] In determining that, at liquidation, overcharged duties paid by an importer previously become an "amount paid as increased or additional duties under section 505(c) ["duties determined to be due upon

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[6] The reason for stating the termination date for calculating interest in the alternative is that an importer's successful action brought by filing a summons in the Court of International Trade under 28 U.S.C. 2632 will result in an award for interest which will be "calculated from the date of the filing of the summons in such action to the date of the refund." *See* 28 U.S.C. 2644. Thus, in such a case, section 520(c) ensures the calculation of interest from the payment of the overcharged duties until the date of filing the summons.

liquidation or reliquidation"] and thereby subject to interest, the Court of International Trade carried out the legislative intent. In finding that the payment of the overcharged duties prior to liquidation prevented the application of the interest directive of section 520(d), the court of appeals thwarted it.

3. The court of appeals was wrongly troubled by the use of the language "increased or additional duties" in other statutes to mean additional duties determined to be due in liquidation or reliquidation and incorrectly determined that that language constituted a term of art, having the same meaning wherever it appeared. In taking the approach that it did, the court failed to appreciate that "[i]t is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("restraint of trade or commerce" appearing in section 3 of the Sherman Act found to have different meaning than identical term appearing in section 1). *See also District of Columbia v. Carter*, 409 U.S. 418 (1973) (District of Columbia held not to be a "State or Territory" for purposes of 42 U.S.C. 1983, although it is a "State or Territory" for purposes of 42 U.S.C. 1982).

The fact that certain duties determined to be owed on liquidation or reliquidation are described as "increased or additional duties" in some provisions of the Tariff Act where it makes sense to so describe such duties (*e.g.*, section 505(b)) does not require the "increased or additional duties" of section 520(d) to

be given the identical meaning when not required by the context and when to do so produces a result at odds with logic and with legislative history.

4. Finally, unless overturned, the decisions of the court of appeals are certain to render section 520(d) a veritable dead letter. It is our understanding that currently fewer than three percent of import entries are liquidated with a duty increase. Under the court of appeals' rulings, it is only those relatively few entries that could possibly present a claim for interest under section 520(d). Moreover, the rulings create a substantial incentive for the Customs Service to establish a practice—if it has not already done so—of erring on the high side when demanding payment of estimated duties. Of course, under such a practice, with all overcharged duties collected prior to liquidation, section 520(d) will cease to be operational.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Federal Circuit.

Nos. 91-1117, 91-1163.

KALAN, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant/Cross-Appellant.

Sept. 11, 1991.

Importer sought interest on refunds of estimated duties that had been deposited upon the entry of merchandise. The Court of International Trade, Edward D. Re, Chief Judge, 752 F.Supp. 455, allowed interest from the date of liquidation, rather than the date of entry. Appeal and cross appeal were taken. The Court of Appeals, Mayer, Circuit Judge, held that the importer was not entitled to interest on refunds of excess estimated duties deposited at entry under the statute that permits an importer to recover interest only on amounts paid as increased or additional duties at liquidation.

Judgment reversed.

* * *

Sidney N. Weiss, New York City, argued, for plaintiff-appellant.

James A. Curley, Commercial Litigation Branch, Dept. of Justice, of New York City, argued, for defendant/cross-appellant. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen., David M. Cohen, Director and Joseph I. Liebman, Atty. in Charge, Intern. Trade Field Office. Also on the brief was Karen P. Binder, Office of Asst. Chief Counsel, U.S. Customs Service, of counsel.

Before ARCHER, MAYER and CLEVENGER, Circuit Judges.

OPINION

MAYER, Circuit Judge.

Kalan, Inc. appeals the judgment of the United States Court of International Trade awarding it interest only from the date of liquidation, rather than from the date of payment, on estimated duties paid at entry and subsequently refunded by the United States Customs Service (Customs). *Kalan, Inc. v. United States*, 752 F.Supp. 455 (Ct. Int'l Trade 1990) (*Kalan II*). The United States cross-appeals, contending that refunds of excess estimated duties deposited at entry bear no interest. We agree with the government and reverse.

Background

The facts are simple and undisputed. During late 1987 and early 1988, Kalan imported key tags from the Republic of Korea. Customs classified the tags as "jewelry" under item 740.41, Tariff Schedules of the United States (TSUS), and required Kalan at entry to deposit duties of 11% *ad valorem*. Kalan complied, but protested that the tags should be classified as non-dutiable "plastics" under TSUS item 774.58 instead. Customs subsequently liquidated the entries "as entered"—it neither refunded any of the duties deposited at entry nor assessed any increased or additional duties—and denied Kalan's protest.

Kalan then filed a civil action contesting the denial in the Court of International Trade. *See* 28 U.S.C. §§ 1581(a),

2631 (1988). The court agreed with Kalan: "the subject product is properly classifiable under item 774.58, TSUS." *Kalan, Inc. v. United States*, 12 C.I.T. 1142, 1146, 1988 WL 128610 (1988) (*Kalan I*). Customs accordingly reliquidated the entries and refunded the liquidated duties in their entirety. It did not, however, pay any interest.

The protest cycle consequently repeated: Kalan protested Customs' refusal to pay interest, the agency denied the claim, and Kalan filed another suit in the Court of International Trade. This time, Kalan did not completely prevail. The government consented to an order awarding Kalan interest on the refunded duties from August 26, 1988, the date Kalan filed its summons in the Court of International Trade, to the date of the refund. *Kalan II*, 752 F.Supp. at 456; *see* 28 U.S.C. § 2644 (1988).* But the court interpreted 19 U.S.C. § 1520(d) to allow Kalan additional interest only from the date Customs liquidated its entries, not the date Kalan paid the estimated duties. Section 1520(d) provides:

> If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, *interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title* at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. *The interest shall be calculated from the date*

* 28 U.S.C. § 2644 provides:

> If, in a civil action in the Court of International Trade under section 515 of the Tariff Act of 1930, the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1986. Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund.

> *of payment* to the date of (1) the refund, or (2) the filing of a summons under section 2632 of Title 28, whichever occurs first. [Emphasis added.]
>
> Section 1505(c), in turn, specifies:
>
> *Duties determined to be due upon liquidation or reliquidation* shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury. [Emphasis added.]

The court reasoned that the estimated duties Kalan paid at entry "are no longer estimated" once the merchandise is liquidated. *Kalan II*, 752 F.Supp. at 457. "Rather, they then became 'duties determined to be due upon liquidation,' within the meaning of section 1505(c)." *Id.* Therefore, the question was not whether Kalan was entitled to interest *vel non*; it was whether interest should run from the date of payment or from the date of liquidation. *Id.* Notwithstanding section 1520(d)'s clear language that interest "shall be calculated from the date of payment," the court interpreted section 1505(c)'s reference to "liquidation or reliquidation," as well as testimony from congressional hearings on the bill containing the two sections, as mandating the payment of interest from the date of liquidation instead. *Id.* at 457.

Discussion

"In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S.Ct. 2957, 2961, 92 L.Ed.2d 250 (1986). This

so-called "no-interest" rule "provides an added gloss of strictness" on the usual rule that waivers of sovereign immunity are construed strictly in favor of the sovereign. *Id.* at 318, 106 S.Ct. at 2963.

> [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Id. (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577 (1947)). *Accord Getty Oil Co. v. United States*, 767 F.2d 886, 889 (Fed.Cir.1985). Section 1520(d) does not contain the affirmative and unequivocal language necessary to entitle Kalan to *any* interest on the refunded excess duties it deposited at entry. Indeed, in conjunction with section 1505(c), other relevant statutory provisions, and the legislative history, section 1520(d) reflects Congress' considered and deliberate refusal to award interest on the type of duties refunded here.

A.

Section 1520(d) expressly allows an importer to recover interest only on amounts "paid as *increased or additional* duties *under section 1505(c).*" 19 U.S.C. § 1520(d) (emphasis added). Section 1505(c), in turn, allows the government to assess interest on delinquent payments only of "duties determined to be due upon liquidation or reliquidation." *Id.* § 1505(c). Here, Customs assessed and Kalan paid *no* duties, "increased" or "additional," at liquidation. All of the entries were liquidated "as entered"; Customs determined that the estimated duties paid at entry satisfied Kalan's tariff obligations. The duties did not thereby

"bec[o]me 'duties determined to be due upon liquidation' within the meaning of section 1505(c)." *Kalan II*, 752 F.Supp. at 457. Except in circumstances not present here, estimated duties are due "at the time of making entry." 19 U.S.C. § 1505(a). They may be *refunded* in whole or in part at liquidation but they are not *due* or *collected* then. Section 1505(b) is likewise unambiguous: "The appropriate customs officer shall collect any increased or additional duties due or refund any excess of duties deposited as determined on a liquidation or reliquidation."

Even accepting the trial court's reasoning, neither it nor Kalan explains how estimated duties paid at entry qualify as "increased" or "additional" duties within the meaning of section 1520(d). As explained in *United States v. Heraeus-Amersil, Inc.*, 671 F.2d 1356, 1357 n. 3, 69 CCPA 86 (1982),

> 19 U.S.C. § 1505(a) requires deposit of estimated duties (i.e., those duties estimated by the importer at time of entry) before the merchandise is released, subject to certain exceptions like posting of a bond. Consequently, imported items cannot leave the docks until the importer's payment (or some recognized equivalent) is presented. Thus, collection or refund of "increased or additional duties" mentioned in § 1505(b) is unrelated to monies paid by the importer at entry. Section 1505(a) leaves no doubt as to when *estimated* duties (as opposed to increased and additional duties) are "due."

We think there is equally little doubt that excess estimated duties are refunded without interest. Neither section 1520(d) itself nor related sections 1505(a)-(c) clearly mandate the payment of interest on duties deposited at entry and subsequently refunded. Besides that, the sole statutory provision dealing directly with the refund of excess deposits is silent about the addition of interest. Section 1520(a) states: "The Secretary of the Treasury is

authorized to refund duties or other receipts . . . whenever it is ascertained on liquidation or reliquidation of an entry that more money has been deposited or paid as duties than was required by law to be so deposited or paid." 19 U.S.C. § 1520(a). Neither we nor the Court of International Trade can supply by creative interpretation the necessary clear direction that Congress omitted.

B.

"When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. We do not believe that this is one of those rare cases where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters.' " *Demarest v. Manspeaker*, 498 U.S.—, —, 111 S.Ct. 599, 604, 112 L.Ed.2d 608 (1991) (citations omitted). To the contrary, the relevant legislative history makes clear beyond any doubt that Congress considered but rejected allowing interest on refunds of excess estimated duties paid at entry.

Sections 1520(d) and 1505(c) are cognate; both were enacted in a single section of the Trade and Tariff Act of 1984. Pub.L. No. 98-573, § 210, 98 Stat. 2948, 2977 (1984). The House report accompanying the Act's predecessor bill explains the sections' genesis:

> Currently, a deposit of the estimated duties owed must be made at the time of entry of merchandise, other than entry into warehouse, for transportation, or under bond. If it is determined that increased or additional duties are due, the appropriate customs officer must collect them. *If any excess duties are being refunded, no interest is payable thereon.* No time limits are fixed for the payment of additional or increased duties, and no interest on such amounts owed can be assessed.

* * *

> Until February 18, 1982, the United States Customs Service had based its debt collection responsibilities upon the proposition that "[a] bill for duties, taxes, or other charges is due and payable upon receipt thereof by the debtor" [ ]. However, on February 18, 1982, the United States Court of Customs and Patent Appeals upheld a decision of the Court of International Trade in the [*Heraeus*] case. The decision provides that increased or additional duties determined to be due on liquidation or reliquidation are not due and payable by the importer until either the protest period has expired without a protest being filed (90 days after liquidation or reliquidation), or where a protest has been filed and denied, the time to appeal to the Court of International Trade under 28 U.S.C. § 1581(a) has expired (180 days after denial). Thus, in the latter situation, collection efforts cannot be initiated for a minimum of 270 days.
>
> * * *
>
> Without legislation to overturn the *Heraeus* decision and with the current high interest rates prevailing throughout the country, it is anticipated that any normal business entity, legally able to delay payment of large sums of money without interest, would take advantage of that opportunity.

H.R.Rep. No. 98-1015, 98th Cong., 2d Sess. 67-68, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4910, 4960, 5026-27 (House Report).

Thus, Congress added section 1505(c) to change the effect of *Heraeus:* henceforth, *increased or additional* duties determined to be due upon liquidation or reliquidation would be due 15 days after the date of the liquidation or reliquidation rather than the minimum 90 days allowed under prior law. The Report distinguishes estimated duties

deposited at entry from increased or additional duties assessed at liquidation and makes clear that section 1505(c) applies only to the latter.

> The second part of this legislation [section 1520(d)] recognizes the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum. It is similar to but, *as regards increased or additional duties*, goes beyond 28 U.S.C. 2644 which allows interest to be paid to a successful plaintiff in the Court of International Trade but only from the date of filing of the summons, regardless of the date of payment.

Id. at 5027 (emphasis added). Again the intent is clear. Section 1520(d) allows an importer to recover interest on subsequently refunded *increased* or *additional* duties. Only in that regard does the section "go[ ] beyond" 28 U.S.C. § 2644, which allows interest on the *entire* refunded amount "but only from the date of filing of the summons" to the date of the refund. Because section 1520(d) allows interest only on increased or additional duties, it requires that the interest rate be "determined as of the 15th day after the date of liquidation or reliquidation"—when section 1505(c) specifies that increased or additional duties, determined on liquidation, *see* 19 U.S.C. § 1505(b), are due.

In short, the House Report confirms that neither section 1520(d) nor section 1505(c) changed prior law: "If any excess duties are being refunded, no interest is payable thereon." House Report at 5026. Curiously, the trial court ignored the House Report. It relied instead on testimony presented at the congressional hearings on H.R. 3159, the predecessor bill to section 210 of the Trade and Tariff Act of 1984. *See Kalan II*, 752 F.Supp. at 458. But that testimony is consistent with the House Report and underscores Congress' awareness, consideration, and ultimate rejection of the view that it should allow interest on refunds of excess estimated duties. *Id.*

Congress thought it a sound policy to award interest on refunds of some duties but not others; whether we agree with that policy or instead with Kalan's view that the policy is unfair is irrelevant. "The immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *Library of Congress v. Shaw*, 478 U.S. at 321, 106 S.Ct. at 2965 (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. at 663, 67 S.Ct. at 606).

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed.

REVERSED.

APPENDIX B

United States Court of Appeals
for the Federal Circuit

No. 91-1172

HOSPITAL CORPORATION OF AMERICA,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

DECIDED: September 20, 1991

Before NEWMAN, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and LOURIE, *Circuit Judge*.

NEWMAN, *Circuit Judge*.

DECISION

The United States appeals the decision of the Court of International Trade [1] awarding Hospital Corporation of America post-liquidation interest on the refund of customs duties deposited at the time of entry pursuant to 19 U.S.C. § 1520(d). The issue has been decided in *Kalan Inc. v. United States*, Nos. 91-1117, 91-1163 (Fed. Cir. Sept. 11, 1991). For the reasons explained in *Kalan*, the decision of the Court of International Trade is *reversed*. In accordance

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[1] *Hospital Corporation of America v. United States*, 752 F. Supp. 459 (Ct. Int'l Trade 1990).

with 19 U.S.C. § 1520(d) Hospital Corporation is not entitled to interest for the period between liquidation and reliquidation, when the excess duties had been deposited at the time of entry and liquidated at the erroneously high rate. As discussed in *Kalan*, "increased or additional duties" as used in 19 U.S.C. § 1520(d) is a term of art, distinct from "excess duties" paid upon entry. We take note of the argument that the usage of the word "overcharge" in the legislative history, H.R. Report No. 98-1015, 98th Cong., 2d Sess. 68, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4960, 5026, supports a different interpretation; but in view of the meaning in Customs law of the terms "excess", "increased", and "additional" duties, that meaning must apply. Thus interest, on the facts of this case, is payable only for the period after the filing of the summons in accordance with 28 U.S.C. § 2644.

APPENDIX C

United States Court of International Trade.

Court No. 88-08-00688.

KALAN, INC.,

Plaintiff,

v.

THE UNITED STATES, ET AL.,

Defendants.

Nov. 21, 1990.

Importer sought interest on refunds of estimated duties deposited upon entry of merchandise. On cross motions for summary judgment, the Court of International Trade, Re, Chief Judge, held that importer was entitled to interest on refund of estimated duties deposited upon entry of merchandise from date of liquidation, rather than from date of entry, when estimated duties were paid.

Motions granted in part and denied in part.

* * * * * *

Sidney N. Weiss, New York City, for plaintiff.

Stuart M. Gerson, Asst. Atty. Gen.; Joseph I. Liebman, Atty. in Charge, Intern. Trade Field Office, Commercial Litigation Branch (James A. Curley), and (Sheryl A. French and Karen P. Binder, New York City, of counsel, U.S. Customs Service), for defendants.

RE, Chief Judge:

In general terms, the question presented in this case pertains to the date from which importers are entitled to interest, under 19 U.S.C. § 1520(d), on refunds of estimated duties deposited upon the entry of the merchandise.

The merchandise in this action consists of key tags imported from the Republic of Korea. Upon liquidation, the merchandise was classified by the Customs Service as jewelry under item 740.41 of the Tariff Schedules of the United States. (TSUS), with duty at the rate of 11 per centum *ad valorem*. Plaintiff protested this classification and contended that the merchandise was properly classifiable as "[a]rticles not specially provided for, of rubber or plastics," under item 774.58, TSUS, free of duty under the Generalized System of Preferences. This protest was denied, and suit was thereafter commenced in this court. In *Kalan, Inc. v. United States*, 12 CIT—, slip op. 88-165, 1988 WL 128610 (Dec. 1, 1988) (*Kalan I*), this court held that the merchandise was properly classifiable as "[a]rticles not specially provided for, of rubber or plastics," under item 774.58, TSUS, and entered judgment in favor of plaintiff.

It is not disputed that, upon the entry of the merchandise, plaintiff paid estimated duties. It is also not disputed that the entries in this case have been reliquidated in accordance with the decision of this court in *Kalan I*, that all overcharged duties have been refunded to the plaintiff, and that plaintiff has not received any interest on the refunded duties.

Plaintiff contends that, pursuant to 19 U.S.C. § 1520(d), it is entitled to interest on the refunded duties from the date of the actual payment of the estimated duties. According to plaintiff, the excess estimated duties deposited upon the entry of the merchandise are "increased or additional duties" within the meaning of section 1520(d), which mandates payment of interest retroactive to the date of payment.

Defendants contend that plaintiff "is not entitled to payment of interest under 19 U.S.C. § 1520(d) because the language of the statute does not provide for such payment on a refund of estimated duty."

Plaintiff also contends that, under 28 U.S.C. § 2644, it is entitled to interest on the excess duties paid from the date of the filing of the summons. In its motion for summary judgment, defendants admit that plaintiff is entitled to interest from the date of the filing of the summons. Defendants also "consent to entry of an order allowing payment of interest to Kalan under § 2644 from August 26, 1988, the filing date of the summons, to the date of refund."

The question presented is whether, under 19 U.S.C. § 1520(d), plaintiff is entitled to interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

Under section 1520(d) importers are entitled to interest on refunds from "the date of payment" of all "increased or additional duties under section 1505(c)." Since section 1505(c) applies only to "[d]uties determined to be due upon liquidation or reliquidation," the court concludes that section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties. Rather, since the estimated duties paid by plaintiff became duties due upon liquidation, it is the holding of the court that plaintiff is entitled to interest on its refunds from the date of liquidation.

Contending that there are no genuine issues of material fact, both parties move for summary judgment pursuant to Rule 56 of the Rules of this Court.

DISCUSSION

On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). Furthermore, "[t]he court may not resolve or try factual issues on a motion for summary judgment." *Phone-Mate, Inc. v. United States*, 12 CIT—, 690 F.Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed.Cir.1989).

Defendants contend that section 1520(d) does not apply to estimated duties, which are paid upon entry of merchandise, and they therefore contend that plaintiff is not entitled to any interest under section 1520(d) on the refunds of its estimated duties. It is clear, however, that although plaintiff has paid estimated duties upon entry, once the merchandise is liquidated, the duties are no longer estimated. Rather, they then became "[d]uties determined to be due upon liquidation," within the meaning of section 1505(c). Hence, the specific question presented in this case is whether, under section 1520(d), plaintiff is entitled to interest on a refund of estimated duties, paid upon the entry of the merchandise, from the date of payment of those duties, or whether plaintiff is entitled to interest from the date of liquidation.

The question presented is to be resolved by an interpretation of the governing statutes. It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Section 1520(d) provides that:

> *If a determination is made to reliquidate an entry as a result of a protest filed under section 1514* of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by

> an appropriate court, *interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title* at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

19 U.S.C. § 1520(d) (1988) (emphasis added).

Section 1505(c), which is expressly referred to in section 1520(d), provides that:

> Duties determined to be due *upon liquidation or reliquidation* shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

19 U.S.C. § 1505(c) (1988) (emphasis added). It is important to note that both section 1520(d) and section 1505(c) were enacted as section 210 of the Trade and Tariff Act of 1984, Pub.L. No. 98-573, 98 Stat. 2948, 2977 (1984).

The interpretation of section 1520(d) together with section 1505(c) indicates that Congress did not intend to grant interest on refunds of estimated duties from the date of payment of those duties. Section 1520(d) is expressly limited to "increased or additional duties under section 1505(c)." Section 1505(c), in turn, is expressly limited to "[d]uties determined to be due upon liquidation or reliquidation." It is clear, therefore, that section 1520(d) does not grant interest on refunds of estimated duties paid upon the entry of the merchandise.

Furthermore, it is well established that, as part of the legislative history of a statute, the testimony presented at

congressional hearings may be helpful in ascertaining the intent of Congress. *See, e.g., Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204-12, 100 S.Ct. 2601, 2617-21, 65 L.Ed.2d 696 (1980). In this case, the testimony and comments received by the Subcommittee on Trade of the House Ways and Means Committee on H.R. 3159, the House bill which was eventually enacted into law as section 210 of the Trade and Tariff Act of 1984, provides convincing support for the conclusion of the court. A careful review of the testimony and comments leaves no doubt that, in considering H.R. 3159, the Subcommittee on Trade was aware that the government, bar, and industry understood that the bill did not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

For example, Arthur I. Rettinger, an attorney with the Office of the Chief Counsel of the United States Customs Service, testified that "the bill in no way affects overpayments or underpayments of estimated duties as these payments have traditionally been recognized as separate and distinct from liquidations for refunds or liquidations involving additional assessments." *Hearings on H.R. 3159 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. (1983), *reprinted in Miscellaneous Tariff and Trade Bills: Hearings and Written Comments Before the Subcomm. on Trade of the Comm. on Ways and Means of the House of Representatives*, 98th Cong., 1st and 2d Sess., Serial 98-76, at 18 (1985) (hereinafter *Hearings*).

The industry's interpretation of H.R. 3159 may be gleaned from the statement of Eugene J. Milosh, executive vice president of the American Association of Exporters and Importers (AAEI). Mr. Milosh explained that:

> At the time of entry the Customs Service has the authority under section 505(a) of the Tariff Act of 1930, authority which it frequently exercises, to insist

> that the importer pay estimated duties in an amount deemed appropriate by the Service. It is AAEI's belief that the great majority of entries are accompanied by duty deposits in amounts ultimately deemed proper by the Customs Service. *These duty deposits are not the subject of this legislation. H.R. 3159 addresses only increased duties, that is additional duties found due subsequent to entry at the time of liquidation or re-liquidation.*

Hearings at 113. Indeed, in his testimony regarding the bill Mr. Milosh set forth a proposed amendment which would have granted interest on refunds of estimated duties from the date of entry. *See id.* at 114-16. Furthermore, Ms. Marjorie M. Shostak, appearing before the Subcommittee on behalf of the Joint Industry Group, stated that "[t]he provision in . . . H.R. 3159 to pay interest on re-liquidations of entries applies only to amounts deposited as increased duties and does not include the duty deposited when the entry was filed." *Id.* at 129. Like Mr. Milosh, Ms. Shostak recommended that "interest should be paid on any amounts refunded, not merely the increased duty portion thereof." *Id.*

The interpretation of the bar was given by Joseph F. Donohue, Jr., the Chairman of the Administrative Practice Committee of the Customs and International Trade Bar Association. Mr. Donohue stated that H.R. 3159 "provides for the payment of interest on any repayment of increased duties." *Id.* at 117. Mr. Donohue also noted that Customs determines the amount of estimated duties deposited upon the entry of the merchandise. He then advocated that H.R. 3159 be amended to provide for interest on refunds of estimated duties from the date of entry, since "[i]t would be appropriate to include interest on such refund[s] since the importer was deprived [of] the use of the money during the period that it was held by Customs." *Id.* at 120.

A statement was also submitted by the Section of Administrative Law of the American Bar Association. In its

statement, the Section stated that it "[s]upports the provisions of [H.R. 3159] for the payment by the Government of interest on any repayment of increased duties and recommends also that interest be paid on refunds of duty deposited against the original entry." *Id.* at 215.

It is important to note that none of the witnesses who appeared before the Subcommittee interpreted H.R. 3159 to grant interest on refunds of estimated duties from the date of payment of those duties. Furthermore, despite the suggestions of several of the witnesses before the Subcommittee, Congress did not amend H.R. 3159. Hence, the conclusion is inescapable that, after considering the testimony of the witnesses and choosing not to act on the suggested amendments, Congress intended that importers should not receive interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

CONCLUSION

Under 19 U.S.C. § 1520(d) importers are entitled to interest from "the date of payment" on refunds of all "increased or additional duties under section 1505(c)." Since 19 U.S.C. § 1505(c) applies only to "[d]uties determined to be due upon liquidation or reliquidation," the court concludes that section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties. Rather, since the estimated duties paid by plaintiff became duties due upon liquidation, it is the holding of the court that plaintiff is entitled to interest on its refunds from the date of liquidation.

Accordingly, defendants' motion is denied in part and granted in part, and plaintiff's cross-motion is denied in part and granted in part.

APPENDIX D

United States Court of International Trade.

Court No. 89-08-00462.

HOSPITAL CORPORATION OF AMERICA,

Plaintiff,

v.

UNITED STATES,

Defendant.

Nov. 23, 1990.

Importer of medical device sought to recover interest on duty refund paid by United States Customs Service. On cross-motions for summary judgment, the Court of International Trade, Tsoucalas, J., held that: (1) importer was entitled to interest on excess estimated duties held by Customs upon liquidation, from date of payment of excess duty to date of filing of summons, and (2) importer was also entitled under separate statutory provision to receive interest from date of filing of summons to date Customs paid it.

Plaintiff's motion granted; defendant's cross-motion denied.

* * * * * *

Ober, Kaler, Grimes & Shriver, John F. Morkan, III, Baltimore, Md., for plaintiff.

Stuart M. Gerson, Asst. Atty. Gen.; Joseph I. Liebman, Atty.-in-Charge, Intern. Trade Field Office, Commercial Litigation Branch, Civ. Div., U.S. Dept. of Justice, James A. Curley, of counsel: Karen P. Binder, Office of Asst. Chief Counsel, Intern. Trade Litigation, U.S. Customs Service, New York City, for defendant.

OPINION

TSOUCALAS, Judge:

Plaintiff, Hospital Corporation of America ("HCA"), brings this action pursuant to Rule 56 of the rules of this Court for summary judgment, asserting that there is no dispute as to any material facts and that it is entitled to judgment as a matter of law. Plaintiff seeks to recover interest under 19 U.S.C. § 1520(d) (1988), and 28 U.S.C. § 2644 (1988), on a duty refund paid by the United States Customs Service ("Customs").[1] Defendant argues that the refund was of estimated duties and section 1520(d) does not authorize the payment of interest on refunds of estimated duties, only on refunds of "increased or additional duties."

Background

Plaintiff imported the Dornier extracorporeal shock wave lithotripter ("lithotripter") involved in this action in 1986. The lithotripter is a medical device which uses electrical charges to create shock waves that disintegrate kidney

[1] The government has consented to the payment of interest under 28 U.S.C. § 2644, on the refund already paid by Customs to HCA on September 8, 1989. *Defendant's Brief in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* at 5-6 ("Defendant's Brief"). That interest is payable from the date the summons was filed, August 3, 1989, to the date the refund was paid, September 8, 1989. 28 U.S.C. § 2644 (1988). However, that does not address payment of interest on the monetary judgment at issue in this case, *i.e.*, the award of interest on the refund.

stones within a patient's body without surgical intervention. Prior to entry of the merchandise, Customs classified lithotripters as "electro-surgical apparatus" under item 709.15, Tariff Schedules of the United States ("TSUS"). C.S.D. 84-60 (Dec. 30, 1983).

The merchandise then was entered under item 709.15 and stored in a bonded warehouse. In order to release the lithotripters, Customs required a deposit of estimated duties in the amount of $219,157.89, which was the amount due pursuant to classification under 709.15.[2] These duties were deposited by HCA "unwillingly," so that the goods would be released. *Brief in Support of Hospital Corporation of America's Motion for Summary Judgment* at 8 ("Plaintiff's Brief"). On April 3, 1987, Customs liquidated the lithotripter under item 709.15, TSUS.

Plaintiff filed a protest on June 26, 1987, challenging the classification of the merchandise under item 709.15, TSUS, and claiming classification under item 709.17, TSUS, as "electro-medical apparatus, . . . other," which carries a lower rate of duty. In January 1988, Customs revoked its classification of lithotripters under item 709.15, TSUS, and held that lithotripters are properly classified under item 709.17, TSUS, the classification requested by plaintiff in its protest. C.S.D. 88-5 (Jan. 21, 1988). In April 1989, plaintiff requested accelerated disposition of the protest, pursuant to 19 U.S.C. § 1515(b) (1988) and 19 C.F.R. § 174.22 (1988). The protest was deemed denied when Customs did not act on the request within thirty days. *See* 19 U.S.C. § 1515(b); 19 C.F.R. § 174.22(d).

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[2] Customs states that it gave HCA a refund of $25,727.23 at the time of liquidation in April 1987, because the estimated duties had been assessed improperly based on the 1986 rate of 9.2% *ad valorem* rather than on the lower 1987 rate of 7.9% *ad valorem*. No interest was paid on this refund and plaintiff does not seek to recover interest on this amount. *See Defendant's Brief* at 2. Following the refund, the total estimated duties on deposit with Customs was $193,430.66.

HCA filed a summons on August 3, 1989, challenging the classification and the rate and amount of duties. On September 7, 1989, plaintiff filed its Complaint, wherein HCA sought to recover a refund plus interest pursuant to 19 U.S.C. § 1520(d). The next day, September 8, Customs granted the protest, noting that lithotripters should be classified under item 709.17, TSUS. The entry was reliquidated and Customs refunded to HCA the difference between what initially was paid to Customs pursuant to item 709.15, TSUS, and what properly was due under item 709.17, TSUS. However, Customs paid no interest on the refund.

None of these facts is in dispute, and both parties have moved for summary judgment pursuant to Rule 56 of the Rules of the Court of International Trade.

Discussion

When deciding a motion for summary judgment pursuant to Rule 56, the Court must determine if there are any genuine issues of material fact. *Phone-Mate, Inc. v. United States*, 12 CIT—, —, 690 F.Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed.Cir.1989). If there are, summary judgment is inappropriate. Upon examination of the relevant statutes, caselaw and supporting papers, the Court finds that there are no genuine issues of material fact, and hence, judgment as a matter of law is proper in this matter.

I. 19 U.S.C. § 1520(d)

When Customs liquidates an entry, the importer of the entry must pay the duty owed within fifteen days after the date of liquidation. 19 U.S.C. § 1505(c) (1988). If payment is not received by Customs within thirty days after such date, interest is due from the fifteenth day after the date of liquidation. *Id.; Syva Co. v. United States*, 12 CIT—, —, 681 F.Supp. 885, 88990 (1988); *Penrod Drilling Co. v. United States*, 13 CIT—, —, 727 F.Supp. 1463,

1465 (1989). The provision which authorizes the government to collect interest on late payments was added to § 1505 by the Trade and Tariff Act of 1984, and was designed to prevent importers from delaying payment of duties owed to the United States. The rationale for this change was that the United States was denied the rightful use of this money while the importer profited from it.

In fashioning this legislation, Congress acknowledged that if the government is permitted to collect such interest, importers too ought to be allowed to collect interest on overpayments if they are successful in protesting the classification of their merchandise. H.R.Rep. No. 1015, 98th Cong., 2d Sess. 68, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4960, 5027. This "reciprocity of payment of interest" was accomplished "by adding a new paragraph which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as a result of a protest. . . . Interest would be paid on the amount of the overcharge at a rate to be determined by the Secretary of the Treasury." *Id.* at 67, U.S.Code Cong. & Admin.News 5026.

In the present case, HCA was overcharged on the duties it owed for the lithotripter. When Customs liquidated the entry on April 3, 1987, it collected the duty due pursuant to liquidation under item 709.15, TSUS, that is $193,430.66.[3] *See* note 2, *infra.* Plaintiff protested the classification on June 26, 1987. After Customs granted the protest and reliquidated the entry on September 8, 1989, under item 709.17, TSUS, it refunded to plaintiff the difference between what was paid by plaintiff under item 709.15, TSUS, and what properly was owed under item 709.17, TSUS, that is, the overcharge. However, Customs

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[3] Since plaintiff had deposited estimated duties prior to liquidation, the monies due were already in Customs' custody long before the liquidation.

paid no interest on the overcharge and denies that interest is owed to the importer.

Section 1520(d) provides that interest is payable when Customs reliquidates an entry and returns to the importer what was paid as "increased or additional duties under section 1505(c)." Section 1505(c) sets the time limits for payment of "[d]uties determined to be due upon liquidation."[4] If Customs or this Court thereafter determines that excess duties were paid upon liquidation, the importer is entitled to a refund of those excess duties plus interest. 19 U.S.C. § 1520(a) and (d).

Customs contends, however, that "increased or additional duties" do not include excess estimated duties retained by Customs upon liquidation.[5] The government thus construes the increased or additional duties referred to in section 1520(d) to be only those duties which, at the time of liquidation, Customs finds are due in addition to any estimated duties already assessed. This interpretation is founded on Customs' contention that an importer who has deposited estimated duties does not pay any duties at liquidation, unless "increased or additional duties" are imposed. "The only duties paid by [such importers are] estimated duties paid at the time of entry of the merchandise, or shortly after." *Defendant's Brief* at 2, n. 2.

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[4] 19 U.S.C. § 1505(c) provides that:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

[5] Customs bases this argument on the fact that within § 1505, "estimated duties" and "increased or additional duties are discussed in different subsections." *See* 19 U.S.C. § 1505(a) and (b).

The Court finds that Customs has construed § 1520(d) too narrowly to be consistent with its legislative intent, and has improperly excluded excess estimated duties held by Customs upon liquidation from the purview of the section. Estimated duties do not exist in a vacuum. They are the amount which Customs believes will be the duties the importer will owe upon liquidation.[6] Once merchandise is liquidated and Customs determines the duty owed "upon liquidation," the estimated duties cease to be estimates. Whatever portion of those duties is retained by Customs constitutes the duty paid upon liquidation. Though plaintiff did not itself send payment to Customs at liquidation, the estimated duties on deposit with Customs were used to pay what plaintiff was found to owe upon liquidation. Hence, when Customs retained more of HCA's deposit of estimated duties than it should have, HCA paid excess duties upon liquidation.

After the government granted the protest and reliquidated the lithotripter at a lower rate of duty, HCA was entitled to, and received, a refund of the duties it overpaid. 19 U.S.C. § 1520(a). Since the government had use of that money to which it had no rightful claim, 19 U.S.C. § 1520(d) allows the importer to collect interest on the refund. Plaintiff should not be denied interest because it deposited estimated duties prior to liquidation, rather than wait until after liquidation to pay. For the Court to hold otherwise would be to subvert what Congress manifestly intended in enacting reciprocal interest provisions.[7]

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[6] Customs' regulations state that the amount of estimated duties to be deposited shall be "an amount deemed necessary by the district director to sufficiently cover the prospective duties on each item being entered or withdrawn." 19 C.F.R. § 141.103 (1989).

[7] The government contends that this position is not truly reciprocal because Customs would be liable for interest on refunds of estimated duties while the importer would not be liable for interest on estimated duties that are due but are not paid at the time of entry. *Defendant's*

II. 28 U.S.C. § 2644

Plaintiff also seeks to recover interest under 28 U.S.C. § 2644. That section authorizes the payment of interest on monetary relief obtained under a stipulation agreement or by a judgment in a civil action before this Court pursuant to section 515 of the Tariff Act of 1930. 28 U.S.C. § 2644; *United States v. Atkinson*, 6 CIT 257, 261, 575 F.Supp. 791, 795 (1983). Plaintiff has been awarded monetary relief in the form of interest on the refund it received from Customs subsequent to reliquidation of its merchandise. The action having been brought pursuant to section 515 and a monetary judgment having been awarded, plaintiff is entitled to receive interest under § 2644 from the date of the filing of the summons to the date Customs pays plaintiff. 28 U.S.C. § 2644.

Conclusion

Accordingly, the Court holds that plaintiff is entitled to collect interest from Customs on the amount of duty it overpaid. That amount is the difference between what was paid in estimated duties under item 709.15, TSUS, and what rightfully was owed under item 709.17, TSUS, to wit, $88,139.59. Therefore, Customs is directed to pay to HCA interest on $88,139.59 from the date of payment of the excess duty, *i.e.*, the date of liquidation (April 3, 1987), to the date of the filing of the summons (August 3, 1989).[8] Interest shall be at the rate established by law.

Brief at 8. The analogy is inapposite because the Court is not holding that the statute compels Customs to pay interest from the date the estimated duties were paid. Rather, Customs is liable for interest only from the date of payment of the duties due upon liquidation. In this case, since Customs was in possession of an amount intended to cover the "duties due upon liquidation" prior to liquidation, the date of payment was the date of liquidation.

[8] Interest under § 1520(d) "shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons

Customs also is directed to pay interest on the monetary judgment entered herein pursuant to 28 U.S.C. § 2644 from August 3, 1989 until the date payment is made.

JUDGMENT

Plaintiff having moved for summary judgment and defendant having cross-moved for summary judgment, and the Court after due deliberation having rendered a decision herein; now, then, in conformity with said decision, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied, and it is further

ORDERED that defendant pay to plaintiff interest, pursuant to 19 U.S.C. § 1520(d), on the refund paid by defendant on September 8, 1989, to wit, $88,139.59 at the rate of interest established by law, and it is further

ORDERED that such interest is payable from April 3, 1987 to August 3, 1989, and it is further

ORDERED that defendant pay to plaintiff interest, pursuant to 28 U.S.C. § 2644, on the monetary judgment entered above, from August 3, 1989 to the date payment is made by defendant.

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under section 2632 of Title 28, whichever occurs first." 19 U.S.C. § 1520(d). The refund was paid on September 8, 1989, hence the filing of the summons on August 3, 1989 occurred first.

APPENDIX E

UNITED STATES CODE, TITLE 19

§ 1505. Payment of duties

(a) Deposit of estimated duties

Unless merchandise is entered for warehouse or transportation, or under bond, the importer of record shall deposit with the appropriate customs officer at the time of making entry, or at such later time as the Secretary may prescribe by regulation (but not to exceed thirty days after the date of entry), the amount of duties estimated by such customs officer to be payable thereon.

(b) Collection or refund

The appropriate customs officer shall collect any increased or additional duties due or refund any excess of duties deposited as determined on a liquidation or reliquidation.

(c) Duties due upon liquidation or reliquidation; delinquency; interest

Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

(June 17, 1930, ch. 497, title IV, § 505, 46 Stat. 732; June 2, 1970, Pub. L. 91-271, title II, § 204(c), 84 Stat. 283; Oct. 3, 1978, Pub. L. 95-410, title I, § 103, 92 Stat. 889; Jan 12, 1983, Pub. L. 97-446, title II, § 201(e), 96 Stat. 2350; Oct. 30, 1984, Pub. L. 98-573, title II, § 210(a), 98 Stat. 2977.)

§ 1520. Refunds and errors

(a) Cases in which refunds authorized

The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

(1) *Excess deposits*

Whenever it is ascertained on liquidation or reliquidation of an entry that more money has been deposited or paid as duties than was required by law to be so deposited or paid;

(2) *Fees, charges, and exactions*

Whenever it is determined in the manner required by law that any fees, charges, or exactions, other than duties and taxes, have been erroneously or excessively collected; and

(3) *Fines, penalties, and forfeitures*

Whenever money has been deposited in the Treasury on account of a fine, penalty, or forfeiture which did not accrue, or which is finally determined to have accrued in an amount less than that so deposited, or which is mitigated to an amount less than that so deposited or in remitted.

(4) *Prior to liquidation*

Prior to the liquidation of an entry, whenever it is ascertained that excess duties, fees, charges, or exactions have been deposited or paid by reason of clerical error.

(b) Authorization of appropriations

The necessary moneys to make such refunds are authorized to be appropriated annually from the general fund of the Treasury.

(c) Reliquidation of entry

Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction; or

(2) any assessment of duty on household or personal effects in respect of which an application for refund has been filed, with such employee as the Secretary of the Treasury shall designate, within one year after the date of entry.

(d) Interest rates; calculation

If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title, or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of Title 28, whichever occurs first.

(June 17, 1930, ch. 497, title IV, § 520, 46 Stat. 739; June 26, 1934, ch. 756, § 2, 48 Stat. 1225; June 25, 1938, ch. 679, § 18, 52 Stat. 1086; Aug. 8, 1953, ch. 397, § 20, 67

Stat. 519; June 2, 1970, Pub. L. 91-271, title II, § 210, 84 Stat. 287; Oct. 3, 1978, Pub. L. 95-410, title II, § 210, 92 Stat. 903; Oct. 30, 1984, Pub. L. 98-573, title II, §§ 210(b), 212(c)(B), formerly 212(b)(7)(B), 98 Stat. 2977, 2984, renumbered Oct. 22, 1986, Pub. L. 99-514, title XVIII, § 1889(3), 100 Stat. 2925.)

APPENDIX F

Excerpt (Pages 66-69) From
H.R. REP. NO. 1015, 98th Cong., 2d Sess. (1984)

Section 203. Date of Liquidation or Reliquidation

(Originally introduced as H.R. 3159 by Mr. Gibbons)

Section 203 would amend section 505 of the Tariff Act of 1930 (19 U.S.C. 1505) by adding a new paragraph which would prescribe the due date of liquidation or reliquidation of duties to be 15 days after the date of liquidation or reliquidation and, if not paid within 30 days after that date, interest would be assessed from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury. Further, this section would be effective thirty days after enactment and any pending duties would be due thirty days following enactment.

This section would also amend section 520 of the Tariff Act of 1930 (19 U.S.C. 1520) by adding a new paragraph which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as a result of a protest filed under section 514 of the Act or if an application for relief is made under subsection (c)(1) of Section 520 of the Tariff Act of 1930 or if reliquidation is ordered by an appropriate court. Interest would be paid on the amount of overcharge at a rate to be determined by the Secretary of the Treasury and determined as of the 15th day after the date of liquidation or reliquidation. Interest would be calculated from the date of payment to the date of refund or the filing of a summons under 2632 of title 28, United States Code, whichever occurs first.

The rate of interest to be assessed under this legislation should be determined in the same manner as the Secretary of the Treasury currently determines the rates of interest applicable to underpayments and overpayments of income

taxes pursuant to 26 U.S.C. 6622 with the rate based on the prime interest rate charged by banks and with provision for adjustment of the rate on March 31 or September 30 of each year.

The Committee understands that Customs will take no disciplinary action against importers solely on the grounds of failure to pay increased or additional duties on liquidation or reliquidation until a decision is reached on a protest filed under section 514.

Currently, a deposit of the estimated duties owed must be made at the time of entry of merchandise, other than entry into warehouse, for transportation, or under bond. If it is determined that additional or increased duties are due, the appropriate customs officer must collect them. If any excess duties are being refunded, no interest is payable thereon. No time limits are fixed for the payment of additional or increased duties, and no interest on such amounts owed can be assessed. The increased duties need not be paid on liquidation and need not be deposited in order to protest their assessment before the Customs Service; they must be paid prior to filing a civil action in the Court of International Trade, or the expiration of the time for filing such an action (180 days).

The procedures for collecting duties beyond the deposited amount and for refunding excess duties paid are as follows:

A notice of any additional or increased duties being assessed must be sent to the importer of record or to the actual owner of the imported merchandise. Regulations of the U.S. Customs Service provide procedures for the refunds of excess duties collected. 19 CFR 24.36. Separate application to the assistant regional commissioner of the pertinent internal revenue region must be made for refunds of excess internal revenue taxes paid.

Finally, regulations require that notice of liquidation of formal entries be given by bulletin notice and provide for

notice of liquidation of other entries including entries liquidated by operation of law. 19 CFR 159.9-159.10. While courtesy notices of the liquidation of certain entries may be sent to importers or their agents, the actual bulletin notices are posted in the various customhouses, each notice covering entries filed at that customs port of entry or station. Thus, an importer or other person must check the bulletin notices regularly to ascertain whether entries have been liquidated and the dates of such liquidation if a refund is due, but a bill for any additional or increased duties owed will be sent.

This legislation is strongly supported by U.S. Customs and the U.S. Treasury.

Until February 18, 1982, the United States Customs Service had based its debt collection responsibilities upon the proposition that "[a] bill for duties, taxes, or other charges is due and payable upon receipt thereof by the debtor" (19 CFR 24.3(e)). However, on February 18, 1982, the United States Court of Customs and Patent Appeals upheld a decision of the Court of International Trade in the case of *United States v. Heraeus-Amersil, Inc.*, 671 F.2d 1356. The decision provides that increased or additional duties determined to be due on liquidation or reliquidation are not due and payable by the importer until either the protest period has expired without a protest being filed (90 days after liquidation or reliquidation), or where a protest has been filed and denied, the time to appeal to the Court of International Trade under 28 U.S.C. 1581(a) has expired (180 days after denial). Thus, in the latter situation, collection efforts cannot be initiated for a minimum of 270 days.

The effect of the proposed legislation would be to allow Customs to take immediate steps to collect monies determined to be due and payable to the United States. If the duties were not paid within the time allotted by this bill, then the importers would be assessed interest in accord-

ance with section 306 of Public Law 96-304 and regulations to be promulgated by the Customs Service.

Without legislation to overturn the *Heraeus* decision and with the current high interest rates prevailing throughout the country, it is anticipated that any normal business entity, legally able to delay payment of large sums of money without interest, would take advantage of that opportunity.

The second part of this legislation recognizes the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum. It is similar to but, as regards increased or additional duties, goes beyond 28 U.S.C. 2644 which allows interest to be paid to a successful plaintiff in the Court of International Trade but only from the date of filing of the summons, regardless of the date of payment. The rate of interest to be paid will be that applicable to a late payment of the particular entry.

For purposes of this legislation, liquidation shall be defined as the final computation or ascertainment of the duties or drawback occurring on an entry (19 CFR 159.1).

As discussed above, the U.S. Customs service has continually based its debt collection responsibilities upon the proposition that "[a] bill for duties, taxes, or other charges is due and payable upon receipt thereof by the debtor." (19 CFR 24.3(e)). The decision by the U.S. Court of Customs and Patent Appeals has determined that increased or additional duties determined to be due on liquidation or reliquidation are not due and payable by the importer until either the protest period has expired without a protest being filed or where a protest has been filed and denied, the time to appeal to the Court of International Trade under 28 U.S.C. 1581(a) has expired.